

1 was represented by counsel during the hearing and testified on her own behalf. [AR 39-44]. Testimony also
 2 was received from a vocational expert. [AR 44-45].

3 In a June 20, 2011 written hearing decision that constitutes the Commissioner's final decision in this
 4 matter, the ALJ found that plaintiff had not engaged in substantial gainful activity since her alleged onset
 5 day of July 1, 2006, and that her disability insured status expired on September 20, 2009. [AR 27]. The ALJ
 6 determined that plaintiff had severe impairments consisting of obesity, high blood pressure, asthma, carpal
 7 tunnel syndrome, and lumbar radiculopathy. [AR 27]. The ALJ further found that plaintiff retained the
 8 residual functional capacity ("RFC") to perform a limited range of medium work. [AR 28]. Taking into
 9 consideration plaintiff's subjective complaints, which the ALJ found partially credible, the ALJ found that
 10 plaintiff was able to perform her past relevant work as a customer service clerk, order clerk, receptionist,
 11 and teller. [AR 31]. Therefore, the ALJ concluded that plaintiff was not disabled at any time from July 1,
 12 2006, through the date of her decision. [AR 32].

13 **Standard of Review**

14 The Commissioner's denial of benefits should be disturbed only if it is not supported by substantial
 15 evidence or is based on legal error. Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th Cir.
 16 2006); Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). "Substantial evidence" means "more than
 17 a mere scintilla, but less than a preponderance." Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir.
 18 2005). "It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
 19 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (internal quotation marks omitted). The court is
 20 required to review the record as a whole and to consider evidence detracting from the decision as well as
 21 evidence supporting the decision. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006);
 22 Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). "Where the evidence is susceptible to more than
 23 one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."
 24 Thomas, 278 F.3d at 954 (citing Morgan v. Comm'r, Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999)).

25 **Statement of Disputed Issue**

26 The only disputed issue is whether the ALJ properly considered plaintiff's testimony. [JS 4].

27 **Discussion**

28 Plaintiff contends that the ALJ improperly rejected her testimony about her subjective symptoms.

1 [JS 4-15, 20].

2 Once a disability claimant produces evidence of an underlying physical or mental impairment that
3 is reasonably likely to be the source of the claimant's subjective symptoms, the adjudicator is required to
4 consider all subjective testimony as to the severity of the symptoms. Moisa v. Barnhart, 367 F.3d 882, 885
5 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (en banc); see also 20 C.F.R.
6 §§ 404.1529(a), 416.929(a) (explaining how pain and other symptoms are evaluated). Although the ALJ
7 may then disregard the subjective testimony she considers not credible, she must provide specific,
8 convincing reasons for doing so. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001); see also
9 Moisa, 367 F.3d at 885 (stating that in the absence of evidence of malingering, an ALJ may not dismiss the
10 claimant's subjective testimony without providing "clear and convincing reasons"). The ALJ's credibility
11 findings "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the
12 claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony."
13 Moisa, 367 F.3d at 885. If the ALJ's assessment of the claimant's testimony is reasonable and is supported
14 by substantial evidence, it is not the court's role to "second-guess" it. Rollins v. Massanari, 261 F.3d 853,
15 857 (9th Cir. 2001).

16 In evaluating subjective symptom testimony, the ALJ must consider "all of the evidence presented,"
17 including the following factors: (1) the claimant's daily activities; (2) the location, duration, frequency, and
18 intensity of pain and other symptoms; (3) precipitating and aggravating factors, such as movement, activity,
19 and environmental conditions; (4) the type, dosage, effectiveness and adverse side effects of any pain
20 medication; (5) treatment, other than medication, for relief of pain or other symptoms; (6) any other
21 measures used by the claimant to relieve pain or other symptoms; and (7) other factors concerning the
22 claimant's functional restrictions due to such symptoms. See 20 C.F.R. §§ 404.1529(c) (3), 416.929(c)(3);
23 see also Social Security Ruling ("SSR") 96-7p, 1996 WL 374186, at *3 (clarifying the Commissioner's
24 policy regarding the evaluation of pain and other symptoms). The ALJ also may employ "ordinary
25 techniques of credibility evaluation," considering such factors as (8) the claimant's reputation for
26 truthfulness; (9) inconsistencies within the claimant's testimony, or between the claimant's testimony and
27 the claimant's conduct; (10) a lack of candor by the claimant regarding matters other than the claimant's
28 subjective symptoms; (11) the claimant's work record; and (12) information from physicians, relatives, or

1 friends concerning the nature, severity, and effect of the claimant's symptoms. See Light v. Social Sec.
2 Admin., 119 F.3d 789, 792 (9th Cir. 1997); Fair v. Bowen, 885 F.2d 597, 604 n.5 (9th Cir. 1989).

3 Because there was no evidence of malingering, the ALJ was required to articulate specific, clear,
4 and convincing reasons to support her negative credibility finding.

5 In her hearing decision, the ALJ summarized plaintiff's subjective symptom testimony as follows²:

6 The [plaintiff] testified she last worked in 2004. [Plaintiff] stated she could sit and/or stand
7 for ten minutes. She indicated she could walk for five to ten minutes. The [plaintiff] alleged
8 pain in her hips and in her legs. She stated she was in the hospital two years prior because
9 of asthma. The [plaintiff] alleged carpal tunnel syndrome in both wrists. She claimed she
10 had pain in her arms to the shoulder. She stated she had elbow flare ups. She indicated she
11 used prescribed braces for her carpal tunnel. The [plaintiff] testified medication side effects
12 included drowsiness. She claimed she spent most of the day sleeping. The [plaintiff] stated
13 her four children lived [with] her, aged seven to 19.

14 [AR 29].

15 The ALJ found that plaintiff's medically determinable impairments could reasonably be expected
16 to cause some of plaintiff's alleged symptoms, but that her subjective complaints were not fully credible.
17 [AR 28, 30]. Specifically, the ALJ found that plaintiff could lift and carry 25 pounds frequently and 50
18 pounds occasionally, frequently use her hands for handling and fingering, and frequently perform postural
19 activities. [AR 28]. The ALJ also found that plaintiff's exposure to fumes and environmental irritants
20 should be limited. [AR 28]. The ALJ articulated specific, clear, and convincing reasons to support her
21 partial rejection of plaintiff's subjective complaints.

22 Plaintiff first contends that the ALJ erred because "a rejection of a claimant's testimony based on
23 a lack of objective evidence is always legally insufficient." [JS 9]. This is an incorrect statement of the law.
24 The ALJ permissibly considered the lack of objective medical evidence corroborating the alleged severity
25 of plaintiff's subjective symptoms as one factor, among others, supporting the ALJ's credibility finding.
26 See Burch, 400 F.3d at 681 ("Although lack of medical evidence cannot form the sole basis for discounting

27 ² Plaintiff did not challenge the accuracy of the ALJ's summary of plaintiff's subjective
28 testimony. [See JS 10].

1 pain testimony, it is a factor that the ALJ can consider in his credibility analysis.”).

2 In particular, the ALJ relied on the objective evidence of a series of x-rays and MRIs. For example,
3 the ALJ noted that a January 5, 2007 x-ray showed a “[n]ormal lumbosacral spine” with the exception of
4 possible muscle spasm with straightening of lordosis. [AR 272]. An x-ray of plaintiff’s right hip on the
5 same day was unremarkable. [AR 274]. The ALJ noted that plaintiff was assessed with possible lumbar
6 radiculopathy and underlying peripheral neuropathy at a neurology consultation on March 13, 2007. [AR
7 181-182]. Plaintiff was referred for an electromyography (“EMG”) nerve conduction study to confirm the
8 diagnosis. [AR 182]. The EMG was conducted on March 27, 2007, and it revealed chronic lumbar
9 radiculopathy affecting the right L4 nerve root and underlying distal polyneuropathy. [AR 194]. An April
10 26, 2007 MRI of plaintiff’s lumbar spine revealed a straightening of the normal lordotic curvature, usually
11 secondary to muscular spasm, but no evidence of central or foraminal stenosis (narrowing of the spinal
12 canal). [AR 270]. The ALJ also discussed plaintiff’s two day hospitalization in May 2007 for
13 gastroenteritis, dehydration, and weakness, and noted that a September 28, 2007 chest x-ray was normal.
14 [AR 30]. X-rays of plaintiff’s knees taken on December 14, 2010 were unremarkable. [AR 296, 299]. On
15 that same day, multiple x-rays were taken of plaintiff’s lumbar spine and dorsal spine, and the impression
16 was normal. [AR 297-298]. The ALJ permissibly considered this objective evidence in assessing plaintiff’s
17 credibility. Burch, 400 F.3d at 681; Cortez v. Astrue, 2012 WL 253961, at *7 (C.D. Cal. Jan. 27, 2012)
18 (holding that the ALJ properly relied on an MRI, x-rays, and other test results that were “normal” in
19 discounting the claimant’s subjective symptom testimony).

20 Plaintiff next contends that the ALJ erred in discrediting her based on her daily activities, and that
21 the ALJ failed to consider the differences between plaintiff’s daily activities and her ability to work eight
22 hours a day, five days a week. [JS at 11]. This contention is without merit because the ALJ did not base
23 her credibility determination on plaintiff’s ability to carry on with her daily activities. Lopez v. Astrue,
24 2012 WL 1020230, at *4 n.3 (C.D. Cal. Mar. 26, 2012) (rejecting a similar argument where “the ALJ did
25 not base his credibility determination on plaintiff’s ability to engage in certain daily activities”).

26 Plaintiff also contends that it was improper for the ALJ to rely on her observations of plaintiff at the
27 hearing. [JS 12]. While an ALJ may not “rely on [her] own observations of the claimant at the hearing as
28 the sole reason for rejecting the claimant’s complaints,” she may use “ordinary techniques of credibility

1 evaluation,” including her observations of the claimant’s demeanor, to evaluate the credibility of a
2 claimant’s subjective allegations. Tonapetyan, 242 F.3d at 1148 (citing Fair, 885 F.2d at 604 n.5); Bunnell,
3 947 F.2d at 346. Here, the ALJ noted that plaintiff

4 betrayed no evidence of pain or discomfort while testifying at the 30-minute hearing. While
5 the hearing was short-lived and cannot be considered a conclusive indicator of the claimant’s
6 overall level of pain on a day-to-day basis, the apparent lack of discomfort during the
7 hearing is given some slight weight in reaching the conclusion regarding the credibility of
8 the claimant’s allegations and the claimant’s [RFC].

9 [AR 29]. There was nothing improper about the ALJ’s noting plaintiff’s demeanor during the hearing.
10 While the ALJ may have erred in identifying the length of the hearing as 30 minutes rather than the 13
11 minutes reflected in the transcript, she acknowledged that the hearing was “short-lived” and said that she
12 was giving this factor only “slight weight.” See, e.g., Bleski v. Astrue, 2011 WL 3859720, at *16 (D. Nev.
13 July 19, 2011) (noting that although the hearing transcript indicated that the hearing was shorter in duration
14 than the ALJ stated, “presumably the participants arrived and were seated before the hearing formally
15 began,” and that the discrepancy did not alter the validity of the ALJ’s observation that the claimant
16 remained seated longer than he said he could), report and recommendation adopted by 2011 WL 3875324
17 (D. Nev. Aug. 30, 2011). While plaintiff’s demeanor had limited probative value in evaluating her
18 credibility, it was not improper for the ALJ to consider it. See Morgan, 169 F.3d at 600 (“The inclusion of
19 the ALJ’s personal observations does not render the decision improper.”); SSR 96-7p, 1996 WL 374186,
20 at *5 (“In instances where the individual attends an administrative proceeding conducted by the adjudicator,
21 the adjudicator may also consider his or her own recorded observations of the individual as part of the
22 overall evaluation of the credibility of the individual’s statements.”).

23 Finally, plaintiff challenges the ALJ’s conclusion that plaintiff’s treatment history undermined her
24 allegations of disabling symptoms because it was essentially routine or conservative in nature, and because
25 plaintiff’s medically determinable impairments were controlled by medication. [AR 29]. For example, the
26 ALJ noted that in an August 2009 pain questionnaire, plaintiff alleged severe daily pain in her side, back,
27 hips, and pelvis, but she also said that the pain lasts “until I take my medication” and that her medication
28 “help[s] to bear the pain.” [AR 29, 149-150]. Plaintiff also said that her back brace and a heating pad helped

1 relieve her pain. [AR 29, 150]. The ALJ permissibly relied on those statements in rejecting the alleged
2 severity of plaintiff's pain. See Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (“[E]vidence of
3 ‘conservative treatment’ is sufficient to discount a claimant's testimony regarding severity of an
4 impairment.”); Warre v. Comm’r, Soc. Sec. Admin., 439 F.3d 1001, 1006 (9th Cir. 2005) (“Impairments
5 that can be controlled effectively with medication are not disabling.”); Armstrong v. Colvin, 2013 WL
6 3381352, at *5 (C.D. Cal. July 8, 2013) (holding that the ALJ properly relied on the claimant’s conservative
7 treatment, including use of a heating pad, to discount her subjective pain complaints); Benavides v. Astrue,
8 2011 WL 4406437, at *5 (N.D. Cal. Sept. 21, 2011) (holding that the claimant’s response to conservative
9 treatment, including the use of a back brace, supported the ALJ’s finding that the claimant’s subjective
10 complaints were not entirely credible).

11 Plaintiff contends that her treatment was not “conservative” because she has been prescribed the
12 narcotic pain medications Percocet (oxycodone and acetaminophen), Vicodin (hydrocodone and
13 acetaminophen), and tramadol. [JS 12-13 (citing AR 41, 149, 332, 334)]. Two of the medical records
14 plaintiff cites are part of a treatment report from Global Pain Care dated September 27, 2011, about three
15 months after the date of the ALJ’s decision. [AR 332, 334]. The Appeals Council reviewed that report and
16 concluded that it did not warrant any change in the ALJ’s decision. [AR 7-11]. See 20 C.F.R. §§ 404.970,
17 416.1470 (stating that the Appeals Council shall consider additional evidence that relates to the period on
18 or before the date of the ALJ's decision, and will review the case if it finds that the ALJ's decision is
19 contrary to the weight of the evidence currently of record). The Global Pain Care report states that plaintiff
20 said that she had taken Vicodin in the past, and that she was started on Percocet for complaints of chronic
21 pain and examination findings of tenderness in the lumbar spine and pain on spinal flexion and extension.
22 [AR 332-334]. Plaintiff also cites her June 2011 hearing testimony that she was taking Vicodin and her
23 August 2009 pain questionnaire stating that she was taking tramadol. [AR 41, 149]. Plaintiff has not pointed
24 to evidence in the record documenting who prescribed tramadol or Vicodin, for how long, or the indications
25 for prescribing those medications. The fact that plaintiff may have been prescribed tramadol and Vicodin
26 at some point and was prescribed Percocet a few months after the hearing does not negate the
27 reasonableness of the ALJ’s inference that her treatment as a whole during the relevant period (July 1, 2006
28 through June 20, 2011) was conservative and routine. Furthermore, the ALJ permissibly relied on plaintiff’s

1 testimony that her medication helped relieve her pain. [AR 29, 41-44, 149-151].

2 The ALJ also concluded that plaintiff's symptoms were not as severe as she alleged because she was
3 not referred to a specialist. [AR 29]. Plaintiff contends that the ALJ's reasoning was faulty because she
4 saw a pain management specialist at Global Pain Care, but plaintiff fails to mention that her visit to Global
5 Pain Care took place three to five months after the date of the ALJ's decision. [See JS 12-13 (citing AR
6 325-336)]. Furthermore, the Global Pain Care treatment notes indicate that plaintiff's pain was "relieved
7 by medications" and that the medication was "helping." [AR 326, 329]. See Warre, 439 F.3d at 1006.
8 Notwithstanding the Global Pain Care reports, substantial evidence supports the ALJ's conclusion that the
9 nature and extent of plaintiff's treatment are not commensurate with the alleged severity of her subjective
10 symptoms.

11 Plaintiff fails to discuss, or even acknowledge, the ALJ's final reason for finding her not credible:
12 the inconsistency between her subjective claims and the opinions of the examining and nonexamining
13 physicians. Therefore, plaintiff has waived any challenge to this remaining aspect of the ALJ's credibility
14 finding. See Greger v. Barnhart, 464 F.3d 968, 973 (9th Cir. 2006) (holding that claimant waived issues
15 because he did not raise those issues before the district court); Bergfeld v. Barnhart, 361 F. Supp. 2d 1102,
16 1110 (D. Ariz. 2005) ("A reviewing federal court will only address the issues raised by the claimant in his
17 appeal from the ALJ's decision.").

18 Notwithstanding plaintiff's waiver of the issue, the ALJ was entitled to consider the inconsistencies
19 between plaintiff's subjective allegations and the conclusions of the examining and nonexamining
20 physicians. See Light, 119 F.3d at 792 (stating that the ALJ may consider information from physicians
21 regarding the nature and effect of a claimant's symptoms). For example, the ALJ described the September
22 23, 2009 consultative evaluation by Dr. Bryan To. [AR 30]. Specifically, the ALJ noted Dr. To's findings
23 that plaintiff ambulated with a normal gait, her lungs were normal with no appreciable wheezing, rhonchi,
24 or rubs; her range of motion in all extremities appeared normal despite subjective range of motion pain; and
25 her straight-leg raise tests were negative bilaterally. [AR 279-280]. Dr. To did not conclude plaintiff was
26 disabled, but rather found that she retained the ability to lift and/or carry 50 pounds occasionally and 25
27 pounds frequently; could stand and/or walk six hours out of an eight-hour workday; had no sitting
28 limitations; could frequently walk on uneven terrain, climb ladders, or work with heights; could frequently

1 use her hands for fine and gross manipulative movements; and could frequently perform postural activities
2 of bending, kneeling, stooping, crawling, and crouching. [AR 281]. The ALJ also gave significant weight
3 to the 2009 and 2010 reports of nonexamining physicians Dr. G. Taylor-Holmes and Dr. M. Sohn [AR 284-
4 293], which were all generally consistent in assessing that plaintiff was able to perform medium work.

5 The ALJ stated that no single assessment was completely adopted, but that she gave plaintiff “the
6 benefit of the doubt . . . [by] adopt[ing] those specific restrictions on a function-by-function basis that are
7 best supported by the objective evidence as a whole.” [AR 31]. The ALJ then correctly noted that “[t]here
8 is no medical source statement from any source that suggests functional limitations more restrictive than
9 the [RFC] found in this decision. There is no medical source statement of functional limitations from any
10 treating source.” [AR 31]. The ALJ could properly consider those physicians’ assessments in weighing
11 plaintiff’s credibility and the lack of any assessment of plaintiff’s functional limitations by a treating source.
12 Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993) (holding that the ALJ did not err in discounting the
13 claimant’s assertions that his back impairment precluded employment where no treating or examining doctor
14 stated or implied that the claimant’s impairments were disabling, and where their reports did not disclose
15 findings indicative of disability).

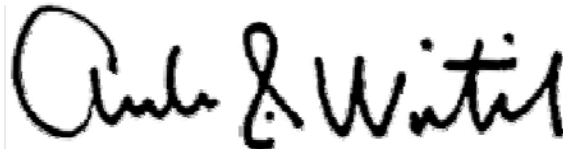
16 The ALJ’s reasons for partially rejecting plaintiff’s subjective testimony were specific, clear, and
17 convincing, and therefore the ALJ did not err in evaluating the credibility of plaintiff’s subjective
18 complaints.

19 Conclusion

20 For the reasons stated above, the Commissioner’s decision is supported by substantial evidence and
21 is free of legal error. Accordingly, the Commissioner’s decision is **affirmed**.

22 **IT IS SO ORDERED.**

23 January 7, 2014

24 

25 ANDREW J. WISTRICH
26 United States Magistrate Judge
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